

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

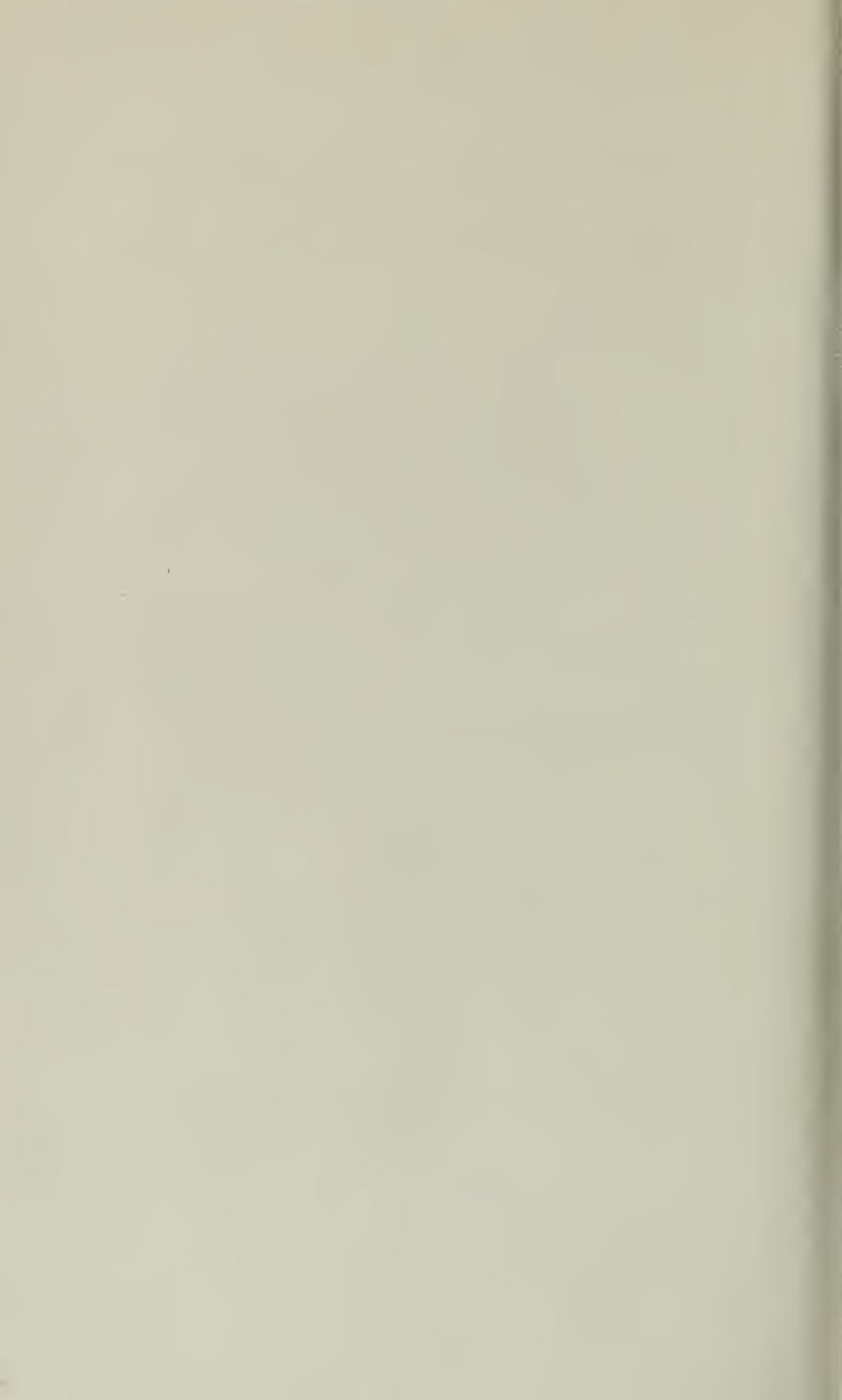
Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED

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U. S. DISTRICT COURT

SAN FRANCISCO



United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Defendant and Plaintiff in Error:

EDWARD A. O'DEA, Esq., and WALTER
McGOVERN, Esq., San Francisco, Cal.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Fran-
cisco.

UNITED STATES OF AMERICA.

District Court of the United States, Northern Dis-
trict of California.

Clerk's Office.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Praeipice (For Transcript on Writ of Error).

To the Clerk of Said Court:

Sir: Please prepare the transcript of record upon
writ of error in the above-entitled cause.

1. Information.
2. Arraignment.
3. Plea of defendant.
4. Petition for return of property and exclusion
of evidence.

5. Answer of Government to petition to return property and exclude evidence.
6. Affidavit of Government in support of answer to petition to return property and exclude evidence.
7. Order submitting motion to return property, etc.
8. Order denying motion to return property, etc.
9. Record of trial.
10. Verdict of jury.
11. Judgment of Court.
12. Motions for new trial and in arrest of judgment.
13. Orders denying each.
14. Clerk's certificate to judgment-roll.
15. Petition for writ of error.
16. Assignment of errors.
17. Citation on writ of error.
18. Return thereto.
19. Order allowing writ of error and supersedeas.
[1*]
20. Supersedeas bond.
21. Cost bond on appeal.
22. Bill of exceptions.
23. Writ of error (original).
24. Clerk's certificate to transcript of record.
25. Admission of service of citation on writ of error.
26. Admission of service of writ of error.

*Page-number appearing at foot of page of original certified Transcript of Record.

27. Stipulations and orders of May 17, 1923; June 16, 1923; June 29, 1923, and July 28, 1923.

EDWARD A. O'DEA and
WALTER McGOVERN,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 18, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[2]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

(No. 12,554.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Information.

At the November term of said Court, in the year of our Lord one thousand nine hundred and twenty-two.

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 3d day of January, 1923, and with leave of the said Court first

having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which our informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents:
THAT

JOE TEMPERANI,

hereinafter called the defendant, heretofore, to wit, on or about [3] 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully, and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit, 3-20 gal. stills; 3 oil-stoves; 1 hydrometer; 1500 gals. of mash,—then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [4]

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:
THAT

JOE TEMPERANI

hereinafter called the defendant, heretofore, to wit, on or about the 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [5]

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW, THEREFORE, your informant presents:
THAT

JOE TEMPERANI,

hereinafter called the defendant, heretofore, to wit, on or about the 1st day of December 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully manufacture certain intoxicating liquor, to wit, 25 gals. of what is called jack-ass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act

of Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [6]

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Asst. U. S. Attorney. [7]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. Laumeister, being first duly sworn, deposes and says: That, Joe Temperani, on or about the 1st day of December, 1922, at 354 Orazabo St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit: 3-20 gal. still; 3 oil-stoves; 1 hydro-meter; 1500 gals. of mash, then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property, by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in

violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act,"

And affiant on his oath aforesaid further deposes and says: That Joe Temperani on or about the 1st day of December, 1922, at 354 Orazabo St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act." [8]

And affiant on his oath aforesaid further deposes and says: That —, on the — day of —, 1921, at —, County of —, in the — Division of the Northern District of California, and within the jurisdiction of this Court, did then and there — certain intoxicating liquor, to wit: —, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the — of the said intoxicating liquor by the said — at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of

October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid deposes and says: That Joe Temperani, on the 1st day of December, 1922, at 354 Orazabo St., City and County of San Francisco, in the Southern Division and District aforesaid, did then and there manufacture certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent, or more of alcohol by volume and fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

W. LAUMEISTER.

Subscribed and sworn to before me this 30 day of Dec., 1922.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California. [9]

[Endorsed]: Filed Jan. 3, 1923. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPORANI,

Defendant.

Petition for Return of Property and Exclusion of Evidence.

To the Honorable, the Above-entitled Court:

The petition of Joseph Temporani, respectfully shows:

That he was arrested on the 1st day of December, 1922, and charged with violating the "National Prohibition Law," and that an information charging him with said offense was filed in this Court on the 3d day of January, 1923.

That on the 1st day of December, 1922, he and his family resided at 354 Orazabo Street in the City and County of San Francisco, State of California; that said premises consisted of a one-story dwelling-house with a basement and a garage underneath said dwelling-house; that said basement was used for the keeping of the various things necessary for family use; that said basement was in the rear portion of said premises and led into the garage which was in the front portion of same; that to said garage

there were double doors, which, on the last-mentioned date, were closed and locked. That in the upper portion of said premises were beds, furniture, food and ordinary things used for maintaining a household, and that all of said premises was the *bona fide* dwelling of the petitioner.

That on the last-mentioned date, and while the petitioner was absent from the premises above-described Prohibition Enforcement Agents Powers and Laumeister, without asking the permission of the defendant or any of the occupants of the dwelling-house, and without the authorization of any search-warrant or order of [11] Court and without any warrant for the arrest of defendant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and without witnessing, before their entry into said premises, any act or acts which could be construed as a violation of the laws of the United States, and without seeing any liquor or property designed for the manufacture of liquor in plain sight and without previously having made a purchase of liquor from said premises and merely on information received from the Ingleside Police Station, illegally and unlawfully entered said premises by going to the rear of same, opening the rear basement door and walking through said basement into the garage above mentioned, and they, illegally and unlawfully and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and without the authorization of a search-warrant and in the manner above described proceed to search said base-

ment and said garage; and as a result of their unlawful and illegal search they, illegally and unlawfully, found in said garage two twenty-gallon stills, three old stoves, one hydrometer, 1500 gallons of mash and 25 gallons of what is called jackass brandy and they, the said Federal Prohibition Enforcement agents, unlawfully and illegally and without the authorization of any search-warrant, and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and in the manner above described, seized same and took same away with them against the will of the defendant, without his permission, without warrant or right of law, and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner; that said articles are held without process of law and your petitioner is entitled either to their return or to have them excluded from the evidence at the trial of said cause.

That the garage above mentioned was a private garage, where the defendant kept his automobile which he used for himself, his wife and children, and was part of the dwelling. [12]

That the Prohibition Enforcement Director, the Prohibition Enforcement agents, and the United States Attorney propose to use said evidence at the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights, under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return

of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, Marshal, Clerk, and Prohibition Enforcement Officers be notified and the Court direct and order said United States Attorney, Marshal, Clerk and Prohibition Officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause.

GUISEPPI TEMPERANI,
Petitioner.

EDWARD A. O'DEA,
Attorney for Petitioner.

VERIFICATION.

State of California,
City and County of San Francisco,—ss.

Joseph Temporani, being first duly sworn, deposes and says: That he is the defendant and the petitioner named in the above-entitled action; that he has read the foregoing petition for the return of property unlawfully seized and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

GUISEPPI TEMPERANI.

Subscribed and sworn to before me this 7th day of March, 1923.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of
San Francisco, State of California. [13]

STIPULATION.

It is hereby stipulated by and between counsel for the above-mentioned parties that the above-mentioned motion may be heard without further notice from either party on the 19th day of March, 1923, at the hours of 10 o'clock A. M.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

Dated: March, 7th, 1923.

[Endorsed]: Filed Mar. 7, 1923. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOE TEMPERANI,
Defendant.

Answer to Petition for Return of Property and Exclusion of Evidence.

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F.

Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that all of the said premises was the *bona fide* dwelling of the petitioner, but alleges the fact to be that the garage or basement referred to was at all of the times in petitioner's petition mentioned a distillery or shop where illicit and contraband intoxicating liquor, to wit, jackass brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was by the said defendant, Joe Temperani manufactured for beverage purposes in violation of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. Denies that the entry into the said garage or basement by said Prohibition officers or either or any of them was illegal or unlawful or in violation of the Fourth or Fifth Amendments to the Constitution of the United States of America, and,

Denies that the search for and seizure of the said personal property mentioned and described in petitioner's petition herein was or is illegal or unlawful, and in this connection alleges the facts to be as set forth in the affidavit of W. Laumeister hereto attached made a part hereof and marked Exhibit "A," to all intents [15] and purposes to the same effect as if set out herein in full.

WHEREFORE respondent prays that said petition be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. U. S. Attorney.
Attorneys for Plaintiff. [16]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JOE TEMPERANI,
Defendant.

**AFFIDAVIT IN OPPOSITION TO PETITION
FOR RETURN OF PROPERTY AND EX-
CLUSION OF EVIDENCE.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. Laumeister, being first duly sworn, deposes and says: that he is, and at all of the times herein mentioned was a Federal Prohibition Agent, and acting as such under the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That the premises at No. 354 Orazabo Street in the City and County of San Francisco, State of California, is a one-story building with a garage underneath; that the opening to the garage is from the said Orazabo Street, which said garage is disconnected from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the first day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from the said garage. That thereafter, and upon the first day of December, 1922, affiant together with the other Prohibition Agent, were near the premises, to wit, No. 354 Orazabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other Prohibition Agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used [17] in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there property designed for the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one percentum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and the other Prohibition Agent found three coal-oil

stoves lighted ad burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicat-liquor, to wit, jackass brandy, and 25 gallons of intoxicating liquor, to wit, jackass brandy containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other Prohibition Agent then and there seized the above-mentioned property and the same is now in the possession of the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That thereafter the said defendant, J. Temperani, stated to affiant that the said stills and the property hereinbefore mentioned belonged to him and that he was manufacturing the said intoxicating liquor. That thereafter, and on the said first day of December, 1922, affiant arrested the said defendant J. Temperani and filed an information charging the said defendant with having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20-gallon stills, three coal oil-stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacture of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of the

said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession. [18]

That affiant did not nor did the other Prohibition Agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other Prohibition Agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, and with the odor of intoxicating liquor, to wit, jackass brandy, manufactured by the distillation of mach and containing one-half of one per centum and more of alcohol by volume and fir for use for beverage purposes. That at all of the times herein mentioned said liquor was illicit and contraband.

W. LAUMEISTER.

Subscribed and sworn to before me March 20, 1923.

[Seal]

C. W. CALBREATH,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 20, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Minutes of Court—March 26, 1923—Order Submitting Motion for Return of Property and Motion to Exclude Evidence.

This case came on regularly for hearing of motion for return of certain property seized in connection with this case, also for hearing of motion to exclude evidence. After hearing E. A. O'Dea, Esq., Attorney for defendant, and B. F. Geis, Esq., Asst. U. S. Atty., the Court ordered said matters submitted. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Minutes of Court—March 28, 1923—Order Denying Motion for Return of Property and Motion to Exclude Evidence.

Pursuant to oral opinion this day rendered, it is ordered that the motion for order for return of certain property seized in connection with this case and to exclude same from the evidence be and the same is hereby overruled and denied. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 2d day of May in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM C. VAN FLEET, District Judge.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPARANI.

Minutes of Court—May 2, 1923—Record of Trial.

This case came on regularly this day for trial of defendant, Joe Temperani, upon information filed herein. Said defendant was present with his attorney, E. A. O'Dea, Esq. G. J. Fink, Esq., Asst. U. S. Atty. was present for and on behalf of the United States. Upon calling of case, all parties answering ready for such trial, the Court ordered that the same do proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly called by lot, sworn, examined and

accepted, were duly sworn to try the issues herein, viz.:

George H. Croley.	George Dias.
Herbert P. Blanchard.	Jos. M. O'Malley.
Clayton P. Smith.	John W. King.
John H. Masterson.	A. E. Berg.
H. M. Schmidt.	W. H. Blanchard.
C. D. Carman.	Walter E. McGuire.

Thereupon Mr. O'Dea moved the Court for order and presented petition for return of property and exclusion of evidence. After hearing Mr. O'Dea and Mr. Fink, the Court ordered said motion and petition denied and to which order Mr. O'Dea, on behalf of defendant, entered an exception.

Mr. Fink called Edward A. Powers and F. D. Stribling, each of whom was sworn as a witness on behalf of the United States and examined, and introduced in evidence parts of three [22] stills, which were filed and marked U. S. Exhibit No. 1, and rested.

Mr. O'Dea thereupon moved the Court for order instructing jury to return verdict of not guilty and, after hearing Mr. O'Dea, the Court ordered said motion denied and to which order Mr. O'Dea on behalf of defendant entered an exception.

Mr. O'Dea then called the defendant, Joe Temparani, who was duly sworn and examined, through Interpreter H. Nespoli, who was duly sworn as such, and rested case on behalf of defendant.

Mr. Fink then recalled Edward A. Powers and F. D. Stribling, who were further examined on behalf of the United States, and introduced in evi-

dence on behalf of the United States a bottle and contents which were filed and marked U. S. Exhibit No. 2, and rested.

Mr. O'Dea thereupon, on behalf of defendant, moved the Court for order instructing jury to return verdict of not guilty, which motion the Court ordered denied and to which order exception was entered.

The case was then argued by Mr. O'Dea and Mr. Fink and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being so instructed, retired at 3:20 P. M., to deliberate upon a verdict, and subsequently returned into Court at 3:25 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and in answer to question of the Court stated they had agreed upon a verdict and presented a written verdict which the Court ordered filed and recorded, viz.:

“We, the jury, find Joe Temperani, the defendant at the Bar, guilty as charged.

CLAYTON P. SMITH,
Foreman.”

Thereupon the Court ordered that the jurors be discharged from further consideration of this case and from attendance upon the Court until May 3, 1923, at 11 A. M. Further ordered that Juror Jos. O'Malley be excused until May 4, 1923, and Walter E. [23] McGuire excused until May 10, 1923.

After hearing attorneys, the Court ordered matter of judgment continued to May 5, 1923, and that defendant go at large upon bond given for his appearance herein. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

THE UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Verdict.

We, the jury, find Joe Temperani, the defendant at the bar, guilty as charged.

CLAYTON P. SMITH,

Foreman.

[Endorsed]: Filed May 2, 1923, at 3 o'clock and 25 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [25]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Motion for New Trial.

Now comes Joe Temperani, defendant in the

above-entitled cause, and by Edward A. O'Dea, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence in said cause was insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial which errors were duly excepted to.

V.

That the Court, upon the trial of said cause, admitted incompetent evidence offered by the United States of America.

Dated at San Francisco, California, this 7th day of May, 1923.

GUISEPPI TEMPERANI,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant. [26]

Due service of the within motion for new trial is hereby admitted this 5th day of May, 1923.

GROVE J. FINK,

United States Attorney.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[27]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Motion in Arrest of Judgment.

Now comes the defendant, Joe Temperani, and respectfully moves the Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That Count I of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

II.

That Count II of the information filed herein does not charge or state facts sufficient to constitute a

public offense under the laws of the United States against this defendant.

III.

That Count III of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

IV.

That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that Counts I, II and III of the information on file herein do not state public offenses under the laws of the United States.

WHEREFORE, by reason of the premises the defendant prays this Honorable Court that the judgment herein be arrested and [28] withheld and that the conviction of the defendant be declared null and void.

GUISEPPI TEMPERANI,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within motion in arrest of judgment is hereby admitted this 5th day of May, 1923.

GROVE J. FINK,

United States Attorney.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[29]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 7th day of May, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM C. VAN FLEET, District Judge.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

**Minutes of Court—May 7, 1923—Order Overruling
Motion for New Trial and Motion in Arrest of
Judgment.**

This case came on regularly this day for pronouncing of judgment upon defendant, Joe Temperani, who was present in court with his attorney, E. A. O'Dea, Esq. K. M. Green, Esq., Special Asst. U. S. Atty., was present for and on behalf of the United States.

Mr. O'Dea presented motion for new trial and motion in arrest of judgment. Said matters were argued and submitted, and after due consideration had thereon, the Court ordered that both of said motions be and the same are hereby denied, to which order an exception was entered.

Thereupon, no sufficient cause appearing why judgment should not be pronounced, the Court or-

dered that said defendant Joe Temperani, for offense of which he stands convicted, as to First Count, pay a fine in sum of \$250.00; as to Second Count, pay a fine in sum of \$250.00; and as to Third Count, defendant be imprisoned for period of 6 months in County Jail, county of San Francisco, State of California. Further ordered that said defendant stand committed to custody of U. S. Marshal to execute said judgment, and that a commitment issue.

On motion of Mr. O'Dea and with consent of Mr. Green, further ordered that supersedeas bond on appeal be fixed in sum of \$2,000.00. [30]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

THE UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Judgment on Verdict of Guilty.

Kenneth M. Green, Esq., Assistant United States Attorney, and the defendant with his counsel came into Court. The defendant was duly informed by the Court of the nature of the Information filed on the 3d day of January, 1923, charging him with the crime of violation National Prohibition Act; of his arraignment and plea of Not Guilty; of his trial

and the verdict of the jury on the 2d day of May, 1923, to wit:

“We, the jury, find Joe Temperani, the defendant at the bar, guilty as charged.

CLAYTON P. SMITH,

Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment; THAT, WHEREAS, the said Joe Temperani having been duly convicted in this Court of the crime of violation National Prohibition Act,—

IT IS THEREFORE ORDERED AND ADJUDGED that the said Joe Temperani pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars as to the first count of the Information; pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars as to the second count, and be imprisoned for the period of six (6) months in the San Francisco County Jail as to the third count of the Information.

Judgment entered this 7th day of May, A. D. 1923.

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Entered in Vol. 14, Judg. and Decrees, at page 398. [31]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Clerk's Certificate to Judgment-roll.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and seal of said District Court this 7th day of May, 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [32]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Petition for Writ of Error and Supersedeas.

Now comes Joe Temperani, defendant herein, by Edward A. O'Dea, Esq., his attorney, and says that on the 7th day of May, 1923, this Court rendered judgment herein against the defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were permitted to the prejudice of the defendant all of which will more fully appear from the *Aggignment* of Errors which is filed with this petition.

WHEREFORE the defendant prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to the Circuit Court of Appeals, aforesaid, and that this defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail.

GUISEPPI TEMPERANI,
Defendant.

EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted this 7th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
By GROVE J. FINK,
Asst. U. S. Atty.

[Endorsed]: Filed May 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[33]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Assignment of Errors.

Joe Temperani, defendant in the above-entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against Joe Temperani, now makes and files with his said petition the following assignment of errors herein, upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof

in the District Court of the United States, for the Northern District of California, there is manifest error in this, to wit:

I.

The Court erred in denying the motion made by the defendant and plaintiff in error before the trial of said cause to return and exclude from evidence certain property and knowledge seized from the basement of the home of the defendant by Federal agents as a result of a search and seizure without any search-warrant and without authority of law and in violation of defendant's rights under the Fourth and Fifth Amendments to the United States Constitution.

II.

The Court erred in denying the motion made by the defendant and plaintiff in error at the trial of said cause and after the impanelment of the jury and before the taking of evidence to [34] return to defendant and exclude from evidence property and knowledge obtained by Federal Prohibition Enforcement Officers as a result of a search and seizure from the home of the defendant, to wit, the basement thereof without any search-warrant, and without authority of law and in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, to which ruling the defendant and plaintiff in error duly excepted.

III

The Court erred in denying defendant's and plaintiff in error's motion that the following testi-

mony be stricken out. In response to the question asked Witness Powers for the Government by the Court: Q. I say, had you information? A. Yes, your Honor. I seized several stills of his since at another place. To which ruling defendant and plaintiff in error duly excepted.

IV.

The Court erred in denying the motion of the plaintiff in error, the defendant in this case, to strike out all of the evidence given by Witness Powers upon the ground that said evidence was immaterial, irrelevant and incompetent and was all secured in violation of the defendant's rights guaranteed him by the Fourth and Fifth Amendments to the Constitution of the United States. The substance of said evidence was that Prohibition Enforcement Agents Powers and Laumeister, upon information received from Police Sergeant Tutenberg of the Ingleside Police Station that a still was being operated at the basement of defendant's and plaintiff in error's home. Powers admitted that the information mentioned was the primary reason for his going to defendant's place. Powers said that he could smell liquor a half block away but did not know which of two houses, smell emanated from. Powers going first to the front door of said basement, which he and the Court at times call the garage, finding same locked, without a search-warrant, he went to the door at the side of defendant's residence, opened same, went through an alley to the rear of defendant's premises and without [35] a search-warrant or other authority broke the rear door to said

basement and found therein certain property and liquor and three stills which he claims were in operation, Powers said basement was directly under the place where the defendant and his wife and children ate and slept; that in said basement there was some food. To said ruling on said motion, defendant and plaintiff in error duly excepted.

V.

The Court erred in admitting in evidence three copper stills over the objection of the defendant that they were immaterial, irrelevant and incompetent and taken from the defendant in violation of his constitutional rights. To which ruling, the defendant and plaintiff in error duly excepted.

VI.

The Court erred in overruling the objection made by the defendant and plaintiff in error to the introduction of a bottle of distilled spirits identified by Government Witness Powers and testified to by Government Chemist Stribling to contain 48 and a fraction per cent of alcohol by volume. The objection was made that it was immaterial, irrelevant and incompetent and was not properly identified by Agent Powers, and was taken in violation of the defendant's constitutional rights. To which ruling, defendant and plaintiff in error duly excepted.

VII.

The Court erred in admitting the following testimony over the objection of defendant upon the ground that it was incompetent, irrelevant and immaterial and not proper cross-examination, the defendant having been placed on the stand for a lim-

ited purpose, to wit, to prove that he resided with his wife and family at the place set forth in the information. Defendant was on the stand.

The COURT.—Ask him how they got there—what he told the officers if anything about them.

Mr. O'DEA.—We will object to that question as immaterial, irrelevant and incompetent, and not proper cross-examination. [36]

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

A. He says he brought them there.

Mr. FINK.—Was there any jackass there?

Mr. O'DEA.—We will object to that, because there is no evidence here that there was any jackass brandy.

Mr. FINK.—We have assured the Court we will show that.

Mr. O'DEA.—He has not any right to establish his case by the defendant, against the defendant himself.

The COURT.—He has a right to ask this defendant about anything connected with the transaction, because he has opened up the subject.

Mr. O'DEA.—We just put him on the stand for one purpose.

The COURT.—Won't you accept the ruling of the Court—

Mr. O'DEA.—I will take an exception.

Mr. FINK.—Q. Was there any jackass brandy in quantity, about 25 gallons, there on that date?

Mr. O'DEA.—We will object to that on the same grounds as before, not proper cross-examination.

The COURT.—The same ruling.

Mr. FINK.—Q. Was there any jackass brandy, in quantity about 25 gallons, there on that date?

Mr. O'DEA.—We will object to that on the same grounds as before, not proper cross-examination.

The COURT.—The same ruling.

Mr. O'DEA.—Immaterial, irrelevant and incompetent.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says he does not believe there was."

Mr. FINK.—Q. He does not believe. Ask him if he knows.

I object to that question on the same grounds as not proper cross-examination, and this is the defendant.

The COURT.—Overruled.

Mr. O'DEA.—Exception. [37]

A. "He says he does not know."

Mr. FINK.—Q. There may have been.

Mr. O'DEA.—We will object to that on the same grounds, and on the further ground that the defendant has already answered the question.

The COURT.—Ask him the question whether the stills were in operation.

Mr. FINK.—Q. Were the stills in operation on December 1, 1922?

Mr. O'DEA.—The same objection, if your Honor please.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says he does not know." "He says he went away in the morning, and he does not know if the stills were going or not."

Mr. FINK.—Were the stills in operation when you returned to the house and the officers were there on December 1, 1922?

Mr. O'DEA.—I make the same objection.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says when he got there the stills were in the same condition as they are now. He says they stopped him half a block before he got to the house; he says they handcuffed him half a block away from the house before he got there."

Mr. FINK.—They were not in operation then at the time he got there?

Mr. O'DEA.—I will object to that question on the same grounds, and on the further ground that it has already been asked and answered.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

A. "He says when they got him half a block away and brought him there the stills were in the same condition as they are now." [38]

Mr. FINK.—Q. Were there three coal-oil stoves there?

Mr. O'DEA.—We will object to that on the grounds heretofore stated, and on the further ground that this is the first mention of coal-oil stoves; there was nothing said about it on the prosecution's case in chief, and it is not an issue in this case.

The COURT.—The objection is overruled. He has a perfect right to go into the whole subject.

Mr. O'DEA.—Exception.

A. "He says there were."

Mr. FINK.—Q. Were these stoves lit when you got to the premises?

The COURT.—Burning, you mean?

Mr. FIND.—Yes.

Mr. O'DEA.—We will object to that question, also, if your Honor please.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "No."

Mr. FINK.—Q. Was there a hydrometer in the basement in connection with the rest of the material?

Mr. O'DEA.—We will object to that also.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says when they arrested him they took him in the place and he glanced around and saw the condition of the place, and could not specify whether there were any particular things, all he seen was the things were upset—the stills were broken, and they took him right away."

VIII.

The Court erred in denying the motion of defendant and plaintiff in error made at the conclusion of the evidence offered by the defendant and plaintiff in error, that all of the evidence taken in this case be excluded on the ground that it was [39] taken in violation of the defendant's constitutional

rights. To which ruling, the defendant, and plaintiff in error duly excepted.

IX.

The Court erred in denying the motion of the defendant and plaintiff in error for a directed verdict of not guilty, made at the conclusion of the Government's case, upon the grounds first that the evidence is insufficient to sustain the charge and second, that all the evidence in the case taken in violation of the defendant's constitutional rights. To which ruling, the defendant and plaintiff in error duly excepted.

X.

The Court erred in denying the motion of the defendant and plaintiff in error for a directed verdict of not guilty, made at the conclusion of the defendant's case, upon the grounds that the evidence is insufficient for the reason that whatever evidence was taken, was taken in violation of the defendant's constitutional rights. To which ruling defendant duly excepted.

XI.

The Court erred in denying the motion of the defendant and plaintiff in error for a directed verdict of not guilty, made at the conclusion of all the evidence offered by either party in said cause, upon the grounds that the evidence is insufficient to sustain a conviction on any of the counts, and on the further ground that all of the evidence offered by the Government and admitted in evidence, was taken in violation of the defendant's constitutional rights. To which ruling defendant duly excepted.

XII.

The Court erred in denying the motion for a new trial on behalf of the defendant and plaintiff in error, in this

(1) That the verdict in said cause is contrary to law.

(2) That the verdict in said cause is not supported by the evidence in the case.

(3) That the evidence in said cause is insufficient to justify said verdict. [40]

(4) That the Court erred upon the trial of the cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

(5) That the Court, upon the trial of said cause, admitted incompetent evidence offered by the United States of America. To which ruling the defendant duly excepted.

XIII.

The Court erred in denying the motion in arrest of judgment on behalf of the defendant and plaintiff in error, in this

(1) That count I of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

(2) That count II of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

(3) That count III of the information filed herein does not charge or state facts sufficient to constitute

a public offense under the laws of the United States against this defendant.

(4) That the Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that counts I, II and III of the information on file herein do not state public offenses under the laws of the United States. To which ruling defendant and plaintiff in error duly excepted.

GUISEPPI TEMPERANI,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within assignment of errors is hereby admitted this 7th day of May, 1923.

JOHN T. WILLIAMS,

United States Dist. Attorney.

By GROVE J. FINK,

Asst. United States Dist. Atty. [41]

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[42]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas herein prayed for by Joe Temperani, defendant and plaintiff in error, pending the decision upon said writ of error, is hereby allowed and the defendant is admitted to bail upon the writ of error in the sum of Two Thousand and no/100 (\$2,000.00) Dollars.

The bond for costs of the writ of error is hereby fixed at Two Hundred Fifty and no/100 (\$250.00) Dollars for defendant.

Dated at San Francisco, California, this 7th day of May, 1923.

WM. C. VAN FLEET,
United States District Judge.

Due service of the within order allowing writ of error and supersedeas is hereby admitted this 7th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
By GROVE J. FINK,
Asst. U. S. Attorney.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[43]

(Cost Bond on Appeal.)

12,554.

KNOW ALL MEN BY THESE PRESENTS,
That we, Joe Temperani as principal, and National

Surety Company, as sureties, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty (\$250) Dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, lately at a District Court of the United States for Southern Division the Northern District of California, First Division, in a suit depending in said court, between United States of America vs. Joe Temperani, #12554, a judgment of conviction and sentence was rendered against the said Joe Temperani and the said Joe Temperani having obtained from said Court a writ of error to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Joe Temperani shall prosecute his Writ of Error to effect, and answer all damaged and costs if he shall fail to make his plea good, then the above obliga-

tion to be void; else to remain in full force and virtue.

J. TEMPERANI. (Seal)

NATIONAL SURETY COMPANY. (Seal)

By C. T. HUGHES, (Seal)

Its Attorney in Fact. (His Seal)

Acknowledged before me the day and year first above written.

FRANCIS KRULL. [44]

(Signed) FRANCIS KRULL, (Seal)

U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [45]

(Bond to Appear on Writ of Error.)

12,554.

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS,
That we, Joe Temporani as principal, and National Surety Company and ————— as sureties, are held and firmly bound unto the United States of America, in the sum of Two Thousand (\$2,000) Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents. SEALED

WITH our seals and dated the 7th day of May, in the year of our Lord, one thousand nine hundred and twenty-three:

THE CONDITION of the above recognizance is such, that, whereas, an Information has been filed by the United States Attorney on the 3d day of January, A. D. 1923, in the Southern Division of the United States District Court for the Northern District of California, charging the said Joe Temporani with a violation of the Act of Congress approved October 28, 1919, and known as the National Prohibition Act, committed on or about the 1st day of December, A. D. 1922, to wit: at the district and division aforesaid; thereafter judgment and sentence was made, rendered and entered and writ of error allowed;

AND WHEREAS, the said Joe Temporani has been required to give a recognizance, with sureties, in the sum of Two Thousand (\$2000) Dollars for his appearance before said United States District Court whenever required pending proceeding on writ of error.

NOW, THEREFORE, If the said Joe Temporani shall personally appear at the U. S. Circuit Court of Appeals, Ninth Judicial Circuit, Southern Division of the United States District Court for the Northern District of California, First Division, to be [46] holden at the courtrooms of said courts in the city and county of San Francisco, on the when required, A. D. 192—, at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said

charge and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said courts without leave first obtained, and if shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

JOE TEMPERANI, (Seal)

Address 2440 Jones St., S. F.

NATIONAL SURETY COMPANY. (Seal)

[Corporate Seal] By C. T. HUGHES,

Its Attorney in Fact. (Seal)

Acknowledged before me and approved the day and year first above written.

FRANCIS KRULL, (Seal)

United States Commissioner for the Northern District of California, at S. F.

Name and address of attorney for defendant:

EDW. O'DEA Address: Phelan Bldg., S. F.

[Endorsed]: Filed May 8, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[47]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation and Order Extending Time to and
Including June 16, 1923, to Lodge and Settle
Bill of Exceptions.**

It is hereby stipulated by and between counsel
for the above-mentioned parties that the defendant
may have to and including the 16th day of June,
1923, in which to lodge and settle his proposed bill
of exceptions upon order allowing a writ of error to
the United States Circuit Court of Appeals, in and
for the Ninth Circuit.

Dated this 17th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 17th day of May, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed May 17, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[48]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation and Order Extending Time to and
Including June 30, 1923, to Lodge and Settle
Bill of Exceptions.**

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant may have to and including the 30th day of June, 1923, in which to lodge and settle his proposed bill of exceptions upon order allowing a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated this 16th day of June, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 16th day of June, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Jun. 16, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[49]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation Extending Time in Which to Lodge
and Settle Defendant's Proposed Bill of
Exceptions to the July, 1923, Term.**

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant may have to and including the 28th day of July, 1923, in which to lodge and settle his proposed bill of exceptions upon a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

It is hereby further stipulated that the time to lodge and settle the bill of exceptions of said de-

fendant upon writ of error herein be extended and continued from the present March, 1923, term to and into the next succeeding, July, 1923, term of this court.

Dated this 29th day of June, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 29th day of June, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Jun. 29, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[50]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation and Order Extending Time to and
Including August 27, 1923, to Settle and Present
Bill of Exceptions.**

It is hereby stipulated by and between counsel

for the above-mentioned parties that the defendant may have to and including the 27th day of August, 1923, in which to settle and present his bill of exceptions, upon a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

It is hereby further stipulated that by order of the Court made and entered on the 29th day of June, 1923, that the time to settle said bill of exceptions had been extended and continued from the March term into the next succeeding July term of this Court.

Dated this 27th day of July, 1923.

JOHN T. WILLIAMS,

United States Attorney.

EDWARD A. O'DEA,

Attorney for Defendant.

So ordered.

Dated this 28 day of July, 1923.

JOHN S. PARTRIDGE,

United States District Judge.

[Endorsed]: Filed Jul. 28, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[51]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, the United States Attorney, in and for the Northern District of California, did file in the above-entitled court an information against the defendant, Joe Temperani, and that, thereafter, the said Joe Temperani appeared in court and upon being called to plead to said information pleaded not guilty as shown by the records herein,

AND BE IT FURTHER REMEMBERED, That the defendant, Joe Temperani, who will hereafter be called the defendant, having duly pleaded not guilty and the cause being at issue, the same coming on for trial on Wednesday, the 2d day of May, 1923, before the Honorable William C. Van Fleet,³ District Judge of said court, and a jury duly impaneled, the United States being represented by Grove L. Fink, Esq., Assistant United States Attorney, and the defendant being represented by Edward A. O'Dea, Esq.:

That before said cause came to issue and on the 7th day of March, 1923, the defendant filed a motion for the return of property and exclusion of evidence; said motion is in the words and figures as follows, to wit: [52]

“In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Motion to Return Property and to Exclude Evidence.

To the Honorable, the Above-entitled Court:

The petition of Joseph Temperani respectfully shows: That he was arrested on the 1st day of December, 1922, and charged with violating the ‘National Prohibition Law’ and that an information charging him with said offense was filed in this court on the 3d day of January, 1923.

That on the 1st day of December, 1922, he and his family resided at 354 Orazabo Street in the city and county of San Francisco, State of California; that said premises consisted of a story dwelling-house; with a basement and a garage underneath said dwelling-house; that said basement was

used for the keeping of the various things necessary for family use; that said basement was in the rear portion of said premises and led into the garage which was in the front portion of same; that to said garage there were double doors, which, on the last-mentioned date, were closed and locked. That in the upper portion of said premises were beds, furniture, food and ordinary things used for maintaining a household, and that all of said premises was a *bona fide* dwelling of the petitioner.

That on last-mentioned date, and while the petitioner was [53] absent from the premises above described Prohibition Enforcement Agents Powers and Laumeister, without asking the permission of the defendant or any of the occupants of the dwelling-house, and without the authorization of any search-warrant or order of Court, and without any warrant for the arrest of defendant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and without witnessing, before their entry into said premises, any act or acts which could be construed as a violation of the laws of the United States, and without seeing any liquor or property designed for the manufacture of liquor in plain sight and without previously having made a purchase of liquor from said premises and merely on information received from the Ingleside police station, illegally and unlawfully entered said premises by going to the rear of same, opening the rear basement door and walking through said basement into the garage above mentioned, and

they, illegally and unlawfully and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and without the authorization of a search-warrant and in the manner above described proceeded to search said basement and said garage; and as a result of their unlawful and illegal search they, illegally and unlawfully, found in said garage two twenty-gallon stills, three old stoves, one hydrometer, 1500 gallons of mash and 25 gallons of what is called jackass brandy and they, the said federal prohibition enforcement agents, unlawfully and illegally and without the authorization of any search-warrant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and in the manner above described, seized same and took same away with them against the will of the defendant, without his permission, without warrant or right of law, and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner; that said articles are held without process of law and your petitioner is entitled either to [54] to their return or to have them excluded from evidence at the trial of said cause.

That the garage above mentioned was a private garage where the defendant kept his automobile which he used for himself, his wife and children, and was part of the dwelling.

That the prohibition enforcement director, the prohibition enforcement agents, and the United States Attorney propose to use said evidence at

the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, marshal, clerk and prohibition enforcement officers be notified and the Court direct and order said United States Attorney, marshal, clerk and prohibition officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause.

GUISEPPE TEMPERANI,
Petitioner.

EDWARD A. O'DEA,
Attorney for Petitioner.

VERIFICATION.

State of California,
City and County of San Francisco,—ss.

Joseph Temperani, being first duly sworn, deposes and says: That he is the defendant and the petitioner in the above-entitled action; that he has read the foregoing petition and knows [55] the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

GUISEPPE TEMPERANI.

Subscribed and sworn to before me this 7th day of March, 1923.

[Seal]

THOMAS S. BURNS,
Notary Public in and for the City and County of
San Francisco, State of California.

STIPULATION.

It is hereby stipulated by and between counsel for the above-mentioned parties that the above-mentioned motion may be heard without any further notice from either party on the 19th day of March, 1923, at the hour of 10 o'clock A. M.

JOHN T. WILLIAMS,
United States Attorney.

EDWARD A. O'DEA,
Attorney for Defendant.

[Endorsed]: Filed March 7, 1923. W. B. Mal-
ling, Clerk. C. W. Calbreath, Deputy Clerk.

Received copy, March 7, 1923.

BEN F. GEIS,
Assistant U. S. Attorney."

That to the foregoing petition the United States Attorney filed the following answer: [56]

"In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Answer to Petition for Return of Property and
Exclusion of Evidence.**

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as federal prohibition director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that all of the said premises was the *bona fide* dwelling of the petitioner, but alleges the fact to be that the garage or basement referred to was at all of the times in petitioner's petition mentioned a distillery or shop where illicit and contraband intoxicating liquor, to wit, jackass brandy, containing one half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was by the said defendant, Joe Temperani, manufactured for beverage purposes in violation of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. Denies that the entry into the said garage or basement by said prohibition officers or either or any of them was illegal or unlawful or in violation of the Fourth or Fifth Amendments to the Constitution of the United States of America, and, [57]

Denies that the search for and seizure of the said personal property mentioned and described in petitioner's petition herein was or is illegal or unlawful, and in this connection alleges the facts to be

as set out in the affidavit of W. Laumeister hereto attached made part hereof and marked Exhibit "A," to all intents and purposes and to the same effect as if set out herein in full.

WHEREFORE respondent prays that said petition is denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. U. S. Attorney,
Attorneys for Plaintiff."

[Endorsed]: Filed March 20, 1923. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Exhibit "A."

(Title of Court and Cause.)

**AFFIDAVIT IN OPPOSITION TO PETITION
FOR RETURN OF PROPERTY AND
EXCLUSION OF EVIDENCE.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. Laumeister, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a federal prohibition agent, and acting as such under the federal prohibition director for the State of California, to wit, Samuel F. Rutter;

That the premises at No. 334 Orazabo Street in the city and county of San Francisco, State of California, is a one story building with a garage

underneath; that the opening to the garage [58] is from the said Orazabo Street, which said garage is disconnected from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the first day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from said garage. That thereafter, and upon the first day of December, 1922, affiant together with the other prohibition agent, were near the premises, to wit, No. 354 Orazabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other prohibition agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there property designed for the manufacture of intoxicating liquor to wit, jackass brandy, containing one half of one per centum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and the other prohibition agents found three coal-oil stoves lighted and burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicating liquor, to wit,

jackass brandy, and 25 gallons of intoxicating liquor, to wit, jackass brandy containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other prohibition agent then and there seized the above mentioned property and the same is now in the possession of the federal prohibition director for the State of California, to wit, Samuel F. Rutter; [59]

That thereafter the said defendant J. Temperani stated to affiant that the said stills and the property hereinbefore mentioned belonged to him and that he was manufacturing the said intoxicating liquor. That thereafter, and on the said first day of December, 1922, affiant arrested the said defendant, J. Temperani, and filed an information charging the said defendant with having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20-gallon stills, three coal-oil stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacture of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of the said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession.

That affiant did not nor did the other prohibition agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other prohibition agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, and with the odor of intoxicating liquor, to wit jackass brandy, manufactured by the distillation of mash and containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes. [60] That at all of the times herein mentioned said liquor was illicit and contraband.

W. LAUMEISTER.

Subscribed and sworn to before me March 20, 1923.

[Seal]

C. W. CALBREATH,
Deputy Clerk, District Court N. D. C. of California.

That pursuant to said stipulation, said motion came on to be heard on the 19th day of March, 1923, and was continued by order of the Court to the 26th day of March, 1923; on that day the motion was heard by the Court, the Hon. Robert S. Bean presiding, and the Court saw and examined the originals of the above-mentioned verified petition of defendant, the original affidavit of the said W.

Laumeister, and the original answer of plaintiff to the petition, all of which said papers were then on file in the said cause, and after hearing counsel for the above-mentioned parties, the Court ordered said matters submitted and that, thereafter and on the 28th day of March, 1923, the Court made and entered its order denying the motion of the defendant for the return of certain property seized in connection with the case and to exclude same from evidence.

That upon the trial of said cause, and on the 2d day of May, 1923, a jury was duly impaneled and sworn, whereupon the following proceedings were had:

Mr. O'DEA.—If your Honor please, in order to defend the defendant's rights,—the defense is primarily a question of law—I think under the Gouled case, it is my duty when the jury is empaneled, to make this motion again. I tender again the petition to exclude evidence because it was taken from the defendant.

The COURT.—Of course, I did not pass on it. If you tender it you will have to state the purport of it to me.

Mr. O'DEA.—The petition of Joseph Temperani respectfully [61] shows:

“That he was arrested on the 1st day of December, 1922, and charged with violating the ‘National Prohibition Law’ and that an information charging him with said offense was filed in this court on the 3d day of January, 1923;

That on the 1st day of December, 1922, he and his family resided at 354 Orazabo Street in the city and county of San Francisco, State of California; that said premises consisted of a story dwelling-house with a basement and a garage underneath said dwelling-house; that said basement was used for the keeping of the various things necessary for family use; that said basement was in the rear portion of said premises and led into the garage which was in the front portion of same; that to said garage there were double doors which, on the last-mentioned date, were closed and locked. That in the upper portion of said premises were beds, furniture, food and ordinary things used for maintaining a household, and that all of said premises was a *bona fide* dwelling of the petitioner.

That on last-mentioned date, and while the petitioner was absent from the premises above described Prohibition Enforcement Agents Powers and Laumeister, without asking the permission of the defendant or any of the occupants of the dwelling-house, and without the authorization of any search-warrant or order of court, and without any warrant for the arrest of defendant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and without witnessing, before their entry into said premises, any act or acts which could be construed as a violation of the laws of the United States, and without seeing any liquor or property designed for the manufacture of liquor in plain sight and without previously having made a purchase of liquor from

said premises and merely on information received from the Ingleside police station, illegally and unlawfully entered said premises by going to the rear of same, opening the rear basement door and [62] walking through said basement into the garage above mentioned, and they, illegally and unlawfully and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and without the authorization of a search-warrant and in the manner above described proceeded to search said basement and said garage; and as a result of their unlawful and illegal search they, illegally and unlawfully, found in said garage two twenty-gallon stills, three old stoves, one hydrometer, 1500 gallons of mash and 25 gallons of what is called jackass brandy and they, the said federal prohibition enforcement agents, unlawfully and illegally and without authorization of any search-warrant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and in the manner above described, seized same and took same away with them against the will of the defendant, without his permission, without warrant or right of law, and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner; that said articles are held without process of law and your petitioner is entitled either to their return or to have them excluded from evidence at the trial of said cause.

That the garage above mentioned was a private garage where the defendant kept his automobile

which he used for himself, his wife and children, and was part of the dwelling.

That the prohibition enforcement director, the prohibition enforcement agents, and the United States Attorney propose to use said evidence at the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights, under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, [63] marshal, clerk and prohibition enforcement officers be notified and the Court direct and order said United States Attorney, marshal, clerk and prohibition officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause."

Mr. O'DEA.—(Upon the conclusion of the reading of said affidavit.)

"Now, this is not only a violation of the Fourth and Fifth Amendments, but is also in violation of Section 25 of the National Prohibition Act which says, 'No search-warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, a shop, saloon, restaurant, hotel or boarding-house.' "

The COURT.—“Mr. O’Dea, there is no reason why this should not be presented in the usual way. I will hear you after I hear the other side state the facts. What is the showing on behalf of the Government?”

Thereupon Mr. Fink presented the following pleadings:

Mr. FINK.—An affidavit and answer were filed, your Honor, the affidavit of W. Laumeister is as follows:

“W. Laumeister, being first duly sworn, deposes and says: That he is, and at all the times herein mentioned was a federal prohibition agent, and acting as such under the federal prohibition director for the State of California, to wit, Samuel F. Rutter.”

(I will state in an aside that Laumeister is not now connected with the force, but was at the time he made this affidavit.)

“That the premises at No. 334 Orazabo Street in the city and county of San Francisco, State of California, is a one-story building with a garage underneath; that the opening to the garage is from the said Orazabo Street, which said garage is disconnected [64] from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the 1st day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from the said garage. That, thereafter, and upon the 1st day of December,

1922, affiant together with the other prohibition agent, were near the premises, to wit, No. 354 Orzabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used in manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other prohibition agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there property designed for the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and the other prohibition agents found three coal-oil stoves lighted and burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other prohibition agent then and there seized the above-mentioned property and the same is now in the possession of the federal prohibition director for the State of California, to wit, Samuel F. Rutter.

That thereafter the said defendant, J. Temperani, stated to affiant that the said stills and the property hereinbefore mentioned [65] belonged to him

and that he was manufacturing the said intoxicating liquor. That thereafter and on the said first day of December, 1922, affiant arrested the said defendant, J. Temperani, and filed an information charging the said defendant with having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20-gallon stills, three coal-oil stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacturing of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession.

That affiant did not nor did the other prohibition agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other prohibition agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicat-

ing liquor, and with the odor of intoxicating liquor, to wit, jackass brandy, manufactured by the distillation of mash and containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes. That at all of the times herein mentioned said liquor was illicit and contraband.” [66]

Mr. FINK.—That affidavit was made by Mr. Laumeister.

On March 20, 1923, the answer filed by Mr. Geis is as follows:

“Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as federal prohibition director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that all of the said premises was the *bona fide* dwelling of the petitioner, but alleges the fact to be that the garage or basement referred to was at all of the times in petitioner’s petition mentioned a distillery or shop where illicit and contraband intoxicating liquor, to wit, jackass brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was by the said defendant, Joe Temperani, manufactured for beverage purposes in violation of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. Denies that the entry into the said garage or basement by said prohibition

officers or either or any of them was illegal or unlawful or in violation of the Fourth or Fifth Amendments to the Constitution of the United States of America, and,

Denies that the search for and seizure of the said personal property mentioned and described in petitioner's petition herein was or is illegal or unlawful, and in this connection alleges the facts to be set out in the affidavit of W. Laumeister hereto attached made part hereof and marked Exhibit "A," to all intents and purposes and to the same effect as if set out herein in full.

WHEREFORE, Respondent prays that said petition be denied.

Mr. O'DEA.—I have already cited to your Honor Section 25 of the national prohibition law. Since the national prohibition [67] law went into effect, Congress has imposed penalties upon Government officers who violated the Fourth and Fifth Amendments to the Constitution of the United States, thereby having in consideration the importance of these Amendments, and in order to properly enforce the Fourth and Fifth Amendments of the Constitution of the United States, Congress passed what they called an Act Supplemental to the Prohibition Act, which was approved on November 23, 1921, and is found in Chapter 134 of the Statutes of 1921; Section 6 of said Act, which deals with the point in question, is as follows:

"Any officer, agent or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of

the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who, while so engaged, shall without a search-warrant maliciously and without reasonable cause, search any other building or property, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for a first offense not more than \$1000, and for a subsequent offense not more than \$1000, or imprisonment for not more than one year, or both such fine and imprisonment."

The COURT.—Mr. O'Dea, you are striking at shadows. If you will just read the designation of a private dwelling as defined in Section 25 of the Prohibition Act, you will see it has nothing to do with this case at all.

Mr. O'DEA.—"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property. [68] A search-warrant may issue as provided in Title II of public law numbered 24 of the 65th Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized, shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the

Court shall otherwise order. No search-warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding-house."

The COURT.—Exactly.

Mr. O'DEA.—There is no question raised by the pleadings presented by the Government that the upper portion of this place was a private dwelling. Then the question before the Court is whether a basement and garage, the basement being connected with the garage, is to be excluded from the private dwelling. There is no question here that this is not a shop, it is not a store.

The COURT.—Mr. O'Dea, it is idle to discuss this proposition to me. Judge Bean would have been derelict if he had not held exactly as you say he did against your proposition. The Fourth and Fifth Amendments do not undertake to protect the sanctity of any place other than the private dwelling of the citizen. They do undertake to protect that against invasion for the purpose of search or seizure without a search-warrant; but a private dwelling, as defined in Section 25 of the Prohibition Act, as mentioned in the Act of November 21, is premises occupied solely for the purposes of a private dwelling or [69] domicile, and it has no relation to either a dwelling, proper, or any place connected with it which is being used for any purpose. The law would be a travesty if it undertook to protect from search and seizure a place not de-

voted to the purposes of a dwelling, where it was patent that the law was being violated. Officers of the law are not expected to ignore the obvious and the patent, and they are expected to use their senses, and the very purpose of their appointment is the detection and prosecution of violations of this law; and their senses include that of smell, as well as sight and touch, and the other senses with which nature has endowed them. Now, according to the statement uncontradicted, if you will read your petition carefully, you will see that you do not pretend to say that this was not found in the basement, and you do not pretend to say that the garage was connected with the dwelling part.

Mr. O'DEA.—I allege that in my petition.

The COURT.—No, you do not. You say it was a part, but you do not pretend to assert any place that there was an entrance into the garage from the dwelling part, which was occupied as a residence. Now, there is nothing of a subtle nature in defining what shall constitute a part of the dwelling. You cannot, in order to evade this law, introduce stills and other apparatus for the purpose of manufacturing illicit liquor into a part of the premises which is not occupied by the occupant as a dwelling, and expect them to be protected. The law does not contemplate that. It is idle to undertake to apply Section 4 and Section 5 of the Constitution to the protection of a place such as is described here."

EXCEPTION No. 1.

(After further argument the matter was submitted to the Court for its decision.) [70]

The COURT.—The motion will be denied.

Mr. O'DEA.—I would ask for an exception.

That thereafter, the plaintiff, to maintain the issues on its part to be maintained, introduced and offered in evidence the following testimony, to wit:

Testimony of E. A. Powers, for the Government.

E. A. POWERS, called for the United States, being sworn, testified [71] as follows:

Direct Examination.

I am a prohibition agent. I have been engaged in that service six months, since November 1st. I was in that service on December 1, 1922. I live at 1750 Mission Street, San Francisco, California. On December 1, 1922, I saw the defendant, Joe Temperani at Orazabo Street at his home. I have the number here. It is 334 Orazabo Street, San Francisco, California. Another agent, Walter Lau-meister was with me. On that day I received information that Joe Temperani was operating a still in the basement of his residence and we investigated and you could smell it half a block away. You could smell the mash from the stills. We rang the bell upstairs, and there was no answer and we went to the garage and rear and there was no answer and we walked through the rear door.

Mr. O'DEA.—Now, at this time, I object to the answer on the ground that the evidence offered by the witness is incompetent and immaterial.

The COURT.—He is just stating the circumstances.

(Testimony of E. A. Powers.)

Mr. O'DEA.—I think at this time in order to protect the defendant's rights it would be proper for me to ask him if he had a search-warrant.

The COURT.—You may do that on cross-examination, if it becomes material. Proceed.

At this point the witness testified further:

We entered the basement or garage. It was locked. The garage was. To get in, we shoved the door in. We forced the entrance. We found three twenty-gallon stills, in full operation and found a hydrometer and 1500 gallons of mash and twenty-five gallons of jackass brandy. We waited there and about five minutes afterwards the defendant, Temperani, drove up in a Cole car. He stepped from the car, and we asked him if it was his premises [72] and he said "Yes" and we walked into the garage with the defendant and he admitted that they were his stills, and he brought his wife and child down and they admitted they were his stills and Temperani was asked "These are your stills, Temperani?" He said, "Yes. Who told you I was operating?" Of course, we could not tell him that. Three 20-gallon stills were on stoves and were burning and the mash was cooking. The stoves were not full of mash. The boilers were full of mash. The stills were full of mash, and the fire was burning under them; they were operating. It was in process of distillation. Besides the three stills, we found one hydrometer, 1500 gallons of mash and 25 gallons of brandy. We had informa-

(Testimony of E. A. Powers.)

tion that he was running this still; that he was manufacturing.

The COURT.—And selling it?

WITNESS.—Well, I did not find him selling it.

The COURT.—I say, had you information?

WITNESS.—Yes, your Honor, I seized several stills of his since at another place.

EXCEPTION No. 2.

Mr. O'DEA.—I would ask that that be stricken out.

The COURT.—Oh, no.

Mr. O'DEA.—The motion is granted?

The COURT.—No.

Mr. O'DEA.—I take an exception.

WITNESS (Continuing).—The statements made by the defendant to me just appertained to the stills, that was all. The jackass brandy was in a sort of container. It dropped from the cooler into the container. He did not say that the jackass brandy belonged to him. He said the stills and apparatus there were his. A sample of the jackass brandy was taken by us. I am able to identify this bottle. That [73] is my handwriting on the bottle. I put the label on the bottle there. The liquor that is in the bottle, I took from the container at 334 Orazabo Street, the premises of the defendant. After I had taken this bottle and had placed a label on it, I took it to the chemist.

On cross-examination, the witness testified as follows:

I did not have a search-warrant to search the

(Testimony of E. A. Powers.)

premises, the premises in which the defendant is accused of having this property. The premises were a one-story building and basement. We entered through the rear into the still room, the basement or garage. It was not a finished basement, there was plenty of room for the car. It was not connected in any way by opening a door on the stairway with the residence, or with the upper or residence part of the building. We had to enter it from the outside. The first information that we received was from Police Sergeant Tutenberg. He is a sergeant at that station. He told me that there was a still being operated in the basement of Temperani's home. I did not ask him the source of the information. Laumeister and I went to these premises because we had the information from the sergeant of the Ingleside police station. That was the primary reason for our going to that place. When we got to that place, we went to the front of same. We could smell it a half block away. We investigated and found the smell came from that particular place. There was a house next door.

Mr. O'DEA.—And you did not detect the odor of the mash until you got to the front door of the garage?

WITNESS.—Within a quarter of a block I could smell it.

Mr. O'DEA.—You could smell it in that neighborhood but you could not tell which of the two

(Testimony of E. A. Powers.)

houses it was in, if you discarded entirely the information you had received? [74]

WITNESS.—You could smell the strong odor, and you could follow the odor.

Mr. O'DEA.—Until you got right there?

WITNESS.—Until you got right there.

WITNESS (Continuing).—We tried the garage door. We did not see any still then. We went to the front door upstairs. I rang the bell. There was no response to my call. Then I walked round to the back door. The place was enclosed by a fence and had a side entrance. I opened the door to the side entrance and walked into the yard and from the yard I tried the door leading into the garage and it would not open, so I shoved it in. The basement and garage are all one place; it was not subdivided off at that time. I broke the door leading into the garage. I could see the stills as soon as the door was opened. I did not go into a rear room, I went directly from the yard into the garage. I did not at any time enter any of the rooms in the dwelling or upper part. I went directly from the yard into where the stills were operating. I did not break any other door to go into the place where the garage was. I did not notice what was in the basement besides the garage for the automobile. I noticed that there was a couple of cases of dried apricots in the basement. I do not remember whether there was any other property there. I did not investigate the property. I did not notice whether there was any garlic or

(Testimony of E. A. Powers.)

dried fish in the basement. I did not notice any other food that might be used in maintaining a household. There were steps leading from the front of the house to the street. The basement and the dwelling-house were on the same lot. The basement formed part of the building. I talked with the defendant's wife in the basement, and I saw a little girl about ten or eleven years of age down there. I was never upstairs at all in the house nor was the agent Laumeister up there in the house.

Mr. O'DEA.—There is no question in your mind that the defendant and his wife and the child resided in those premises?

WITNESS.—No, he admitted as much. [75]

The WITNESS (Continuing).—I have no knowledge that the defendant at that time lived at any other place. I never made a purchase from those premises. When I first went to the premises the defendant, Temperani, was not there, and there was no automobile there. He drove up to the side of the house in a machine, a Cole 8, right alongside of the fence. He stepped out and walked into the basement. First he claimed he did not own it and then he did. There was a letter under the garage door addressed to Guisseppi Temperani. We did not take him into custody before we went into the place. He walked into the place with us. It was a basement that they could store a machine in, plenty of room to store a machine in. I do not know if the machine was kept there. The defend-

(Testimony of E. A. Powers.)

ant told me it was a garage and then he said afterwards that he did not keep his machine in there but kept it elsewhere. The basement was not a finished basement. There was plenty of room for an automobile to drive in and out. There was a large door for driving a machine in there. We did not go through the large door. We entered through the rear.

EXCEPTION No. 3.

Mr. O'DEA.—That is all from this witness. At this time I ask that all of the evidence given by the witness be stricken out on the ground that it is immaterial, irrelevant and incompetent and it was all secured in violation of the defendant's rights guaranteed him by the Fourth and Fifth Amendments to the Constitution of the United States.

The COURT.—The objection is overruled, and the motion is denied.

Mr. O'DEA.—Exception. [76]

On redirect examination, the witness testified as follows:

The three copper receptacles which I am shown are stills for making jackass brandy. I can identify these three copper stills. I have them tagged with the name of the defendant, Temperani, 334 Orazaba Street, December 1, Laumeister and Powers, in my handwriting, those are the three stills that I referred to in my direct examination. They were seized December 1, 1922, at 334 Orazaba

(Testimony of E. A. Powers.)

Street. They were seized by Agent Laumeister and myself. They were in full operation at the time I went there. I dumped the jackass brandy in the sewer. I poured coal oil into the mash I found there.

On recross-examination, the witness testified as follows:

I seized the jackass brandy in the basement. The jackass brandy was running from the cooler into this container. I destroyed 25 gallons. I did not see the defendant in that place manufacture any of this jackass brandy. I saw the material in the process of manufacture, however.

Testimony of F. D. Stribling, for the Government.

F. D STRIBLING, called for the United States, being sworn, testified as follows:

Direct Examination.

I am an internal revenue chemist. I have been such something over two years. I am stationed at 63 Appraiser's Building, San Francisco, California. I have heretofore made examinations of liquid for alcoholic contents. I have made several thousand such examinations. The bottle I am handed has been in my possession. I got it from Agent Powers. Agent Powers brought it in. I made a chemical analysis of the contents of that bottle. I found that it contained distilled spirits commonly known as jackass brandy, and containing 59.75 per cent

(Testimony of F. D. Stribling.)
of alcohol by volume. It was brought in on March 19, 1923.

On cross-examination, the witness testified as follows:

I do not know whether or not this is the liquor which was taken from Orazaba Street. It says, "From Cypress Lawn, San [77] Mateo County."

EXCEPTION No. 4.

Mr. FINK.—I ask at this time that there be introduced in evidence the three copper stills present and identified by the witness.

The COURT.—Let them be considered in evidence.

Mr. O'DEA.—I object to the introduction in evidence of these three copper stills on the ground that they are immaterial, irrelevant and incompetent, and were taken in violation of the defendant's constitutional rights.

The COURT.—Overruled.

Mr. O'DEA.—Exception.

**Testimony of E. A. Powers, for the Government
(Recalled).**

E. A. POWERS, recalled for the United States, testified as follows:

This bottle (referring to bottle marked "Cypress Lawn") was brought by mistake. This was a sample we got the second time we arrested defendant. He has not been tried on that charge yet,

(Testimony of E. A. Powers.)

and by mistake they brought the second bottle, which has "Joe Temperani" on it. There is another bottle of the sample that we took.

Mr. FINK.—That is all. I am prepared to rest, with the request of the Court that I be permitted to produce the proper bottle.

EXCEPTION No. 5.

Mr. O'DEA.—If your Honor please, at this time I move for a directed verdict of not guilty on the ground, (1) that the evidence is insufficient to sustain the charge. On the second ground, that all of the evidence in this case was taken in violation of the defendant's constitutional rights.

The COURT.—The motion will be denied.

Mr. O'DEA.—Exception. [78]

That, thereupon, the defendant, Temperani, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony, to wit:

Testimony of Joe Temperani, in His Own Behalf.

JOE TEMPERANI, called in his own behalf, being sworn, testified as follows, through interpreter Hector Nespoli, who was sworn to translate the questions propounded to the defendant from English into Italian and to translate the answers of the defendant, Temperani, from Italian into English:

I am the defendant in this case. On December 1st of last year I lived on Orazaba Street. My

Testimony of Joe Temperani.)

wife and two children live with me. We occupy two rooms upstairs and one downstairs. I had food in the basement. There was a garage in front and it was partitioned off for food for the house. There were steps leading from the back of the place to downstairs in the yard. I and my family would use the back steps to go into the basement or garage or both once or twice and sometimes four or five times a day. Into the rear of the basement there are two doors. There was a door and a partition to go from the little wareroom into the front of the room which was used as a garage. To go from the kitchen to the back yard you will go through the back door and down the steps into the back yard. The kitchen was on the upper floor.

At this point, Mr. O'Dea announced, "That is all."

On cross-examination, the witness testified as follows:

I have been generally going to Alaska every year and from that I worked in a shipyard until I got let off. My occupation on or about December 1, 1922, was pick and shovel work.

EXCEPTION No. 6.

Mr. FINK.—Were these three stills in evidence in the basement of your premises on December 1, 1922? [79]

Mr. O'DEA.—We will object to that on the ground that it is immaterial, irrelevant and in-

(Testimony of Joe Temperani.)

competent, and not proper cross-examination. The defendant was put on the stand for one purpose.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

WITNESS.—When the men got there they found them in the basement.

Mr. FINK.—And they were there then?

WITNESS.—When they came they found them in the basement.

EXCEPTION No. 7.

The COURT.—Ask him how they got there—what he told the officers, if anything, about them.

Mr. O'DEA.—We will object to that question as immaterial, irrelevant and incompetent, and not proper cross-examination.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

WITNESS.—He says he brought them there.

EXCEPTION No. 8.

Mr. FINK.—Was there any mash there on December 1, 1922?

WITNESS.—He says there were two barrels.

Mr. FINK.—Was there any jackass brandy there?

Mr. O'DEA.—We will object to that, because there is no evidence here that there was any jack-ass brandy.

Mr. FINK.—We have assured the Court we will show that.

(Testimony of Joe Temperani.)

Mr. O'DEA.—He has not any right to establish his case by the defendant, against the defendant himself.

The COURT.—He has a right to ask this defendant about anything connected with the transaction, because he has opened up the subject. [80]

Mr. O'DEA.—We just put him on the stand for one purpose.

Mr. O'DEA.—I will take an exception.

WITNESS.—He says he does not think there was any at all there.

EXCEPTION No. 9.

Mr. FINK.—Was there any jackass brandy in quantity about 25 gallons there on that date?

Mr. O'DEA.—We will object to that on the same grounds as before, not proper cross-examination, and immaterial, irrelevant and incompetent.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

WITNESS.—He says he does not believe there was.

Mr. FINK.—He does not believe. Ask him if he knows.

Mr. O'DEA.—I object to that question on the same grounds as not proper cross-examination, and this is the defendant.

The COURT.—Overruled.

Mr. O'DEA.—Exception.

WITNESS.—He says he does not know.

(Testimony of Joe Temperani.)

EXCEPTION No. 10.

Mr. FINK.—Were these stills in operation on December 1, 1922?

Mr. O'DEA.—The same objection, if your Honor please. (Not proper cross-examination, incompetent, irrelevant and immaterial.)

The COURT.—The same ruling.

Mr. O'DEA.—Exception. [81]

WITNESS.—He says he does not know. He says he went away in the morning, and he does not know if the stills were going or not.

Mr. FINK.—Were the stills in operation when you returned to the house and the officers were there on December 1, 1922?

Mr. O'DEA.—I make the same objection.

The COURT.—The same ruling.

WITNESS.—He says when he got there the stills were in the same condition as they are now. He says they stopped him half a block before he got to the house; he says they handcuffed him half a block away from the house before he got there.

Mr. FINK.—They were not, then, in operation at the time that he got there?

Mr. O'DEA.—I will object to that question on the same grounds, and on the further ground that it has already been asked and answered.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

WITNESS.—He says when they got him half a

(Testimony of Joe Temperani.)

block away and brought him there the stills were in the same condition as they are now.

EXCEPTION No. 11.

Mr. FINK.—Were there three coal-oil stoves there?

Mr. O'DEA.—We will object to that on the grounds heretofore stated, and on the further ground that this is the first mention of coal-oil stoves; there was nothing said about it on the prosecution's case in chief, and it is not an issue in this case.

The COURT.—The objection is overruled. He has a perfect right to go into the whole subject.
[82]

Mr. O'DEA.—Exception.

WITNESS.—He says there were.

Mr. FINK.—Were these stoves lit when you got to the premises?

The COURT.—Burning, you mean?

Mr. FINK.—Yes.

Mr. O'DEA.—We will object to that question, also, if your Honor please.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

WITNESS.—No.

EXCEPTION No. 12.

Mr. FINK.—Was there a hydrometer in the basement in connection with the rest of this material?

Mr. O'DEA.—We will object to that also.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

(Testimony of Joe Temperani.)

WITNESS.—He says when they arrested him they took him in the place and he glanced around and saw the condition of the place, but could not specify whether there were any particular things, all he seen was the things were upside down, the stills were broken, and they took him right away.

The WITNESS (Continuing).—On December 1, 1922, I owned the Cole 8 automobile.

That, thereupon, the defendant rested.

EXCEPTION No. 13.

Mr. O'DEA.—That is the defendant's case. At this time I ask again that all of the evidence taken in this case be excluded [83] on the ground that it was taken in violation of the defendant's constitutional rights; and at this time, also, in order to protect the defendant's rights, I will ask a directed verdict on the ground that the evidence is insufficient, for the reason that whatever evidence was taken was taken in violation of the defendant's constitutional rights.

The COURT.—The motion is denied.

Mr. O'DEA.—Exception.

That thereupon the plaintiff, with the permission of the Court, introduced and offered in evidence the following further testimony, to wit:

**Testimony of E. A. Powers, for the Government
(Recalled).**

E. A. POWERS, recalled as a witness for the Government, being sworn, testified as follows:

The bottle I am handed containing liquid I can

(Testimony of E. A. Powers.)

identify. It is the December 1, 1922, bottle. I got the liquid that is in that bottle on Orazaba Street, the premises of the defendant, Joe Temperani. I personally bottled the liquid. After I bottled it I took it to the chemist. It is the sample I thought I was testifying to this morning.

On cross-examination, the witness testified as follows:

This bottle of liquor was taken from the container. The brandy ran from the still in through the condenser to the container. The color of any distilled substance after it leaves the still is whitish. This was taken from the still. This liquid is not white. It is colored. He evidently mixed the coloring matter in that container before he bottled it. To color this liquid, caramel or something [84] like that would have to be dropped into the container. It could be colored immediately after it comes from the still. I don't remember whether I found any coloring matter there or not. I did not put the label on it, Agent Laumeister did. I saw him write on it. After I poured the substance into the bottle I had it with me in my pocket or Laumeister put it in his pocket or we put it in the pocket of the car when we went to the customs-house. I took it out and took it up into the Appraisers Building. I could not say who pasted the tag on the bottle. It is the only sample that was taken from the container. I did not see Laumeister put the tag on it. This bottle looks the same

(Testimony of E. A. Powers.)

as the bottle of stuff that was taken. Outside of the fact that I have the bottle in my hand and it is labelled with Laumeister's name, I would not know whether it was the same or whether any other bottle was the same either. I handed it to one of the chemists. I don't know which one I handed it to. We did not take a receipt for it. I did not put the tag on it. My reason for believing that it is the bottle is because Laumeister's name is on it, and my name is on there too.

On redirect examination, the witness testified as follows:

When two agents are working together one will fill the bottle, and the other write the tag and paste it on. We are in each other's presence all the time.

On recross-examination, the witness testified as follows:

I was in Laumeister's presence that day.

F. D. Stribling, for the Government (Recalled).

F. D. STRIBLING, recalled as a witness for the Government, [85] being sworn, testified as follows:

This bottle containing liquid has been in my possession. I don't know to whom it was delivered. I know, by our records, that Agent Powers brought it to the chemist. I made a chemical analysis of the contents of that bottle. The bottle contained distilled spirits, commonly known as jackass

(Testimony of F. D. Stribling.)

brandy, containing $48\frac{1}{4}$ per cent of alcohol by volume. It was fit for beverage purposes. The seal on the top of the bottle is our seal, the seal of our office. It was placed on that bottle in our office.

EXCEPTION No. 14.

Mr. FINK.—I ask at this time that there be introduced in evidence this bottle of distilled spirits identified by Mr. Powers and testified to contain 48 and a fraction per cent of alcohol by volume.

Mr. O'DEA.—We will object to the introduction of it on the ground that it is immaterial, irrelevant and incompetent, it has not been properly identified by Agent Powers, and that it was taken in violation of the defendant's constitutional rights.

The COURT.—The objection is overruled.

Mr. O'DEA.—I take an exception.

(The bottle was marked U. S. Exhibit 2.)

On cross-examination, the witness testified as follows:

I made the analysis of this liquor personally. I don't know what date it was made, sometime after December 4th. I do not know that this was the bottle that they took from the place there. The bottle was kept in the storeroom.

That thereupon the Government rested, and the defendant offered no further testimony. [86]

EXCEPTION No. 15.

Mr. O'DEA.—No further testimony for the defendant. In order to protect the defendant's rights,

I will have to ask again for a directed verdict, if your Honor please, on the ground that the evidence is insufficient to sustain a conviction on any of the counts, and on the further ground that all of the evidence offered here by the Government and admitted in evidence was taken in violation of the defendant's constitutional rights.

The COURT.—As far as the latter objection is concerned, as I have said, I have ruled on it frequently in response to your different objections; as to the evidence being insufficient, I will have to advise the jury the evidence here in legal effect is quite sufficient to warrant the conviction of the defendant if it satisfies the jury to the extent I shall advise them.

Mr. O'DEA.—Just for the protection of the defendant's rights I want the record to show that I make a formal motion now, at the termination of all of the evidence in the case, that all of the evidence taken from the place be excluded.

The COURT.—I have ruled on that a number of times.

Mr. O'DEA.—I know. It is just for the protection of the defendant's rights, and not any attempt to be facetious.

The COURT.—It never requires more than one motion or one objection to the same effect to protect any defendant's rights on a given subject.

Mr. O'DEA.—I note an exception.

(Thereupon counsel proceeded to argue the case, at the conclusion of which the following proceedings were had.) [87]

Charge to the Jury.

The COURT. (Orally).—This information, as you have been advised, charges the defendant with three several acts which constitute criminal offenses under the so-called Volstead of Prohibition Act. The first count charges the defendant with having, on or about December 1, 1922, at the address testified to, had wilfully and knowingly in his possession certain property designed for the manufacture of liquor, to wit, three 20-gallon stills, three oil stoves, one hydrometer, 1500 gallons of mash, then and there intended for use in violating Title 2 of the Act of Congress of October 26, 1919, to wit, the National Prohibition Act. That Act makes it a criminal offense for one to have in his possession without authorization of law property designed for the purpose of producing liquor. That was designed by Congress as one of the means of preventing the manufacture of illicit liquor for the purpose of evading the Prohibition Act.

The second count charges that on or about the same date, that is, the 1st day of December, 1922, at the same place, the defendant then and there wilfully and unlawfully possessed certain intoxicating liquor, to wit, 25 gallons of what is called jackass brandy, then and there containing one-half of 1 per cent or more *or* alcohol by volume, which was then and there fit for use for beverage purposes. The law provides that it shall be fit for beverage purposes without intending to determine whether or not it is what we would say in common parlance was fit

for our consumption, but which may be used for beverage purposes to distinguish it from wood alcohol, or other substances which are not, in their nature, fit for beverage purposes.

The third count charges the defendant with having on or about the same date manufactured intoxicating liquor, to wit, 25 gallons of what is called jackass brandy, which is also made a criminal [88] offense under the statute.

Now, to this information the plaintiff has interposed a plea of not guilty, and that casts the burden upon the Government to establish the truth of the allegations of the information to your satisfaction and beyond a reasonable doubt before it can ask a verdict of guilty. Proof beyond a reasonable doubt simply means such proof as would satisfy the minds of the jury to a moral certainty; that is such degree of proof as would induce any one of you to take particular action in an important affair of your own life. When that which is laid before you in the way of evidence satisfies you to that extent, it is termed by the law proof to a moral certainty, or beyond a reasonable doubt. It does not mean that the Government is called upon to make a case which leaves no possible room for doubt of any character, but it means that degree of proof which satisfies you beyond what the law terms a reasonable doubt; and that means precisely what is says, a doubt which would rise in the mind of a man of ordinary intelligence, and say that he did not feel satisfied to a moral certainty. When the Government has made proof to you to a degree which does satisfy you to a moral certainty,

then it has made proof to you beyond a reasonable doubt.

In this case the evidence is before you, and it is for your consideration alone. The Court states to you the law, and by that you are bound, but you are not bound by any suggestion of the Court, nor any intimation it may give during the trial, bearing upon the question as to whether it believes a witness or does not, because that is not its function. Sometimes the Court will make a ruling in response to an objection which may possibly convey to your minds an idea that the Court believes or does not believe some statement that has been made. You are not bound by that, at all, and, in fact, should ignore it unless it falls in with your judgment, when you come to review the entire evidence in the case, because it is your function and your responsibility as well to find [89] the facts in the case.

If you find to the degree of certainty that I have indicated that the defendant is guilty under any one or more of these counts, it will be your duty to find him guilty. If you are left with a reasonable doubt upon your mind under any one or all of these counts as to his guilt, then you are bound to give him the benefit of that doubt by an acquittal. The evidence here, as I have suggested, in answer to the motion of defendant's counsel for a directed verdict upon the ground that the evidence was insufficient, is quite sufficient in its legal tendencies, that is, as a matter of law, it is quite sufficient to sustain a verdict of guilty against this defendant under each one of these counts; but whether it satisfies you to the ex-

tent I have indicated is an entirely different question. Its legal tendency means that it is evidence which tends to prove the facts in question, and if it does, then the Court is bound to admit it before you; but as to its probative value, that is, as to whether it satisfies your own minds to the extent that the law requires, is a question of fact, and something entirely for your determination.

Where an information or an indictment contains two or more counts, then it is the province of the jury to find a verdict against the defendant as the evidence shall warrant them in their judgment, under one or more or all of the counts; and it is equally their privilege, under such an information, if the evidence leaves them in doubt under one or more or all of the counts, to find the defendant not guilty. But that is your function.

(Thereupon, at 3:20 P. M., the jury retired and returned into court at 3:25, with a verdict of guilty as charged.) [90] Thereupon said Court continued said case to the 5th day of May, 1923, for judgment at which time said case was continued to May 8, 1923, when the Court rendered its sentence and judgment upon the defendant and granted to said defendant by orders of the Court based upon stipulation of the parties extensions of time in which to lodge and settle his proposed bill of exceptions; that said proposed bill of exceptions was lodged on the 12th day of July, 1923, and that time was granted and extended by stipulation of the parties and orders of the Court to and including the 27th day of August, 1923, in which to settle same.

That said defendant hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same be allowed, signed and sealed and made a part of the record in this case.

Dated this 2d day of August, 1923.

EDWARD A. O'DEA,
Attorney for Defendant. [91]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JOE TEMPERANI,
Defendant.

Notice of Presentation of Bill of Exceptions.

To John T. Williams, United States Attorney, and
Grove L. Fink and Thomas J. Sheridan, As-
sistant United States Attorneys:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendant in the above-entitled cause, and the said defendant will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

EDWARD A. O'DEA,
Attorney for Defendant. [92]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Stipulation Re Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated this 2d day of August, 1923.

JOHN T. WILLIAMS,

United States Attorney.

EDWARD A. O'DEA,

Attorney for Defendant. [93]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Order Settling Bill of Exceptions.

This bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now, signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated this 8th day of August, 1923.

WM. C. VAN FLEET,
United States District Judge.

Due service of the within bill of exceptions is hereby admitted this 2d day of August, 1923.

JOHN T. WILLIAMS,
United States Attorney.

S—F. T. C.

[Endorsed]: Filed Aug. 8, 1923. Walter B. Mal-
ing, Clerk. By C. M. Taylor, Deputy Clerk. [94]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Admission of Service on Writ of Error.

Due service of the writ of error on file herein and the receipt of a copy thereof is hereby admitted this 17th day of October, 1923.

JOHN T. WILLIAMS,

U. S. Attorney.

By T. J. SHERIDAN.

[Endorsed]: Filed Oct. 18, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[95]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Admission of Service on Citation on Writ of Error.

Due service of the citation on writ of error on file herein and the receipt of a copy thereof is hereby admitted this 17th day of October, 1923.

JOHN T. WILLIAMS,

U. S. Attorney.

By T. J. SHERIDAN.

[Endorsed]: Filed Oct. 18, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[96]

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 96 pages, numbered from 1 to 96, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of the United States of America, vs. Joe Temperani, No. 12,554, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorneys for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of thirty-six dollars and twenty-five cents (\$36.25), and that the same has been paid to me by the attorneys for the plaintiff in error herein.

Annexed hereto are the original writ of error (page 98), return to writ of error (page 99) and original citation on writ of error (page 100).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of October, A. D. 1923.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [97]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joe Temperani, plaintiff in error and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Joe Temperani, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, to-

gether with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Nor.
District of California.

By C. W. Calbreath,
Deputy.

Allowed by

JOHN S. PARTRIDGE,
Judge.

Receipt of a copy of the within writ of error is hereby admitted this — day of —, 1923.

[Endorsed]: No. 12,554. United States District Court for the Northern District of California. Joe Temperani, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error (Original). Filed Oct. 17, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[98]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 18th day of October, A. D. 1923, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [99]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America and to John T. Williams, Esq., United States Attorney, and to Grove J. Fink, Esq., and Thomas J. Sheridan, Esq., Assistants to the United States Attorney,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Joe Temperani is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 17th day of October, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of the within citation on writ of error is hereby admitted this — day of —, 1923.

U. S. Attorney.

[Endorsed]: No. 12,554. United States District Court for the Northern District of California. Joe Temperani, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error (Original). Filed Oct. 17, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [100]

[Endorsed]: No. 4129. United States Circuit Court of Appeals for the Ninth Circuit. Joe Temperani, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Received October 24, 1923.

F. D. MONCKTON,
Clerk.

Filed November 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

